

Utura (Migration) [2021] AATA 950 (31 March 2021)

- 1.
- 2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Amina Takala Utura
VISA APPLICANT:	Miss Bemnet Wogene Takele
CASE NUMBER:	2002328
HOME AFFAIRS REFERENCE(S):	2017024015
MEMBER:	Peter Vlahos
DATE:	31 March 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa: • Public Interest Criterion 4020 for the purposes of cl 117.223 of Schedule 2 to the Regulations

This Statement was made on 31 March 2021 at 8.48am

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) – bogus document or false or misleading information in visa application – birth certificate to demonstrate age under 18 – verification checks – certificate issued in error by local official – compassionate or compelling circumstances justifying grant of visa – reliance on local officials – error not contrived by applicants – other evidence of applicant's identity and age provided – sponsor's financial and emotional support for applicant – living and educational expenses – civil conflict and COVID-19 pandemic – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65

Migration Regulations 1994 (Cth), Schedule 2, cl 177.223, Schedule 4, criterion 4020(1), (2), (5)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 6 December 2019 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicant applied for the visa on 10 January 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 117.223 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate was not satisfied that the visa applicant met Public Interest Criterion (PIC) 4020. The sponsor (the review applicant) seeks review of the delegate's decision.
5. The review applicant appeared before the Tribunal on 17 March 2021 to give evidence and present arguments. The Tribunal also received oral evidence from visa applicant Ms Bemnet Wogene Takele, Mr Husen Ninli (the sponsor's ex-husband) and Mrs Rahima Mohammed Huseen. The Tribunal hearing was conducted with the assistance of an interpreter in the Amharic and Oromo and English languages.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 117.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
7. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

8. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
9. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
10. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

11. Primary decision

12. The review applicant provided the Tribunal a copy of the primary decision record which contains the following information.
13. One of the documents submitted with the application to support the claims made by the applicant regarding her age was a *birth certificate*. The document sought to demonstrate that the applicant had not turned 18 years old at the time of application.
14. The Department proceeded to carry out verification checks to establish the authenticity of the document (birth certificate). From the verification checks undertaken, it was established that the document was counterfeit; that it had not been issued by the claimed issuing office and that the said records did not originate from their office.
15. On 8 July 2019 the applicant was invited to comment, on the evidence suggesting that she had provided bogus documents as well as false or misleading information as part of her visa application – namely – her *birth certificate*. The Department further offered the applicant the opportunity to comment on the information that was considered (by the Department) to be false or misleading or that it was a document that was considered to be bogus and advise the Department if there were any compelling circumstances affecting the interests of Australia, or *compassionate or compelling circumstances* affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of any or all of the paragraphs 4020(1)(a) or (b) and subclause 4020(2).
16. On 12 July 2019, and in response to a request for comments on the issue, the sponsor stated as follows: “...she went to the Kebele and asked why her birth certificate did not find by your office. They told her that the employee who gave her birth certificate was a new guy who was fired from the job because he not a competent employee...” In addition to the above, the sponsor also attached a document signed by Gare Lugo Kebele, Honour Files officer. In the document, it was stated “as it tried to express above, birth certificate had given mistakenly without registered on the honour file...” Accordingly, the delegate determined that the applicant had provided the

Department with a fraudulent document as well as false and misleading information in support her visa application.

17. Have the applicants given, or caused to be given a bogus document, or information that is false or misleading in material in particular?

18. In her evidence before the Tribunal, the review applicant told she told the applicant, Ms Benmet Takele to go to the local government offices in her town and do everything required to obtain her birth certificate. Ms Takele did just that the Tribunal was told. She attended the local government offices, provided her identification documents and was provided with her birth certificate which then sent to her relative (her aunt) (the review applicant in Australia).
19. The Tribunal was told that the applicant had do exactly as was requested her by her aunt and relied completely on the competence and knowledge of local officials to provide the necessary document for use in Australia. The applicant said in her evidence, that she paid very little attention to the document's written details. Her task, according to her evidence was to retrieve the required document and to pass it on. This, to the Tribunal's satisfaction was indeed what was done.
20. Subsequently, the 'misleading' information and 'fraud' as to the applicant's birth date became apparent. In response to requests by the Department for clarification of these issues, the review applicant advised the Department *in writing* that the discovered error, as to the applicant's birth date as recorded on an official certificate was the result of an error committed by an administrative staff of the local government office which was inexperienced in his work or had been new in the position and caused the error. The Tribunal received evidence from Ethiopia, from a Ms Rahima Muhammed Huseen (a civil servant) that the information provided to Department was an 'administrative error' committed by an inexperienced member of the local civil service. The Tribunal accepts the evidence provided by Ms Huseen as to the error committed. In the Tribunal's opinion, the 'error' was not contrived with a view to 'mislead' the Department or to make representations which were knowingly untrue. The witnesses, as questioned by the Tribunal do not, in the Tribunal's assessment present as persons who would knowingly seek to mislead officials in order to present a set of circumstances which did not in reality exist. As was said, the document as was provided by the local official was immediately set to the applicant's aunt (the review applicant) in Australia. It was not checked. It was taken as correct and proper by all parties involved. The error was only discovered after the Department questioned the document's authenticity as with regards the information it was exhibiting as true, correct and proper. In the circumstances, after the 'misleading information' was made known, the applicants explained the issue as an *administrative error* committed by an inexperienced local civil servant and that testimony was made known to the Department and was consistently presented by all parties to the Tribunal at the hearing. The Tribunal is therefore satisfied that the applicants did not knowingly give, or cause to be given a bogus document, or information that was false or misleading in material to the Department. The information was caused by administrative oversight by a fledgling local civil servant.
21. Moreover, the applicant (review) has provided details of her niece's education which go a long way to explain her niece's identity and age, which the Tribunal accepts as proper.¹
22. Furthermore, the review applicant stated in her evidence that she had provided support to her 'niece' who was in Ethiopia as she was the only surviving relative of the family. The Tribunal was told that if it was not for the financial support provided by the aunt and family in Australia, the applicant would not be able to attend to her studies of medicine at University or be able to live in Ethiopia. Indeed, in recent years, the Tribunal was told that the situation in

¹see AAT File, Applicant's education book as provided by the review applicant which records the applicant as a student at a local University.

Ethiopia had deteriorated considerably and with the onset of sustained civil strife and war – made more difficult by the onset of the Covid-19 Pandemic, the applicant was finding it difficult and indeed impossible to continue with her studies and life as matters were not peaceful and certain as before. The Tribunal was told that the applicant would be better in Australia with her remaining family which would assist her to continue her education and to live securely – with family around her.

23. Evidence was also received from the review applicant's former spouse, Mr Husen Ninil who told the Tribunal that the applicant had been supported by her family (review applicant) in Australia since her arrival here and has continued to support her with money which allowed her to live in community housing in Ethiopia and to live and be educated. Mr Ninil told the Tribunal that the applicant had all her family in Australia and that family was ready and willing to support her, if she was permitted to come here. To remain in Ethiopia, as the situation was now was both difficult and provides little peace or long-term security.
24. The Tribunal is not satisfied there is evidence the visa applicant had given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, a 'bogus document', or false or misleading information. Therefore the applicants meet PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

25. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
26. There is no evidence that the visa applicant had previously been refused visas for a failure to satisfy PIC 4020. Therefore, PIC 4020 does not apply.

Should the requirements of PIC 4020(1) or (2) be waived?

27. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
28. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
29. For the following reasons, the Tribunal is satisfied that the requirements should be waived.
30. The review applicant provided evidence before the Tribunal at the *hearing* which she repeated her explanation provided in *writing* to the Department, that the information provided was a product of negligence on the part of an inexperienced civil servant. The review applicant was clear and forthright in her evidence before the Tribunal, that the document and its contents were correct and proper and did not check its contents but took it at its 'face value' and provided it 'as issued' to the Department. Indeed, the evidence also provided by the visa applicant confirmed that she also did not check the impugned document but mere

despatched it to her aunt in Australia for her to provide to the Department. The Tribunal, as previously stated received evidence from a civil servant which confirmed that the issued document was the product not of a wilful fraud on the part of the two applicants before the Tribunal but an 'administrative error' caused by a 'new' and 'inexperienced' local Ethiopian civil servant who has subsequently been removed from his position. The Tribunal accepts the explanations provided by the visa applicant and review applicant as truthful and a sufficient explanation as to the circumstances which caused the impugned document to be provided to the Department. The state of affairs in a country like Ethiopia in recent times makes it more likely that such a problem could be created as was the case from a civil service and state machinery which finds it hard to operate in circumstances of civil strife and national emergency. However, the applicants provided other evidence to the Tribunal with regards to the identity of the visa applicant which the Tribunal accepts – for example, the visa applicant's academic records. These records show that she was attending the University and was the person all parties claimed that she was. The Tribunal accepts this evidence as proper. Moreover, the Tribunal received evidence from the review applicant and from her former spouse to say that the review applicant was total dependant on the review applicant for her studies and for her life necessities – for example, food and shelter. If moneys were not sent from Australia from the review applicant it is doubted that the visa applicant would be able to continue her studies at University, let alone, live in Ethiopia. She does not work and has no other means of income. The Tribunal accepts that the visa applicant has a close and strong relationship with her aunt, the review applicant and that relationship is both financial and emotional. The Tribunal also accepts that unless the waiver is applied, it would lead to the separation of the visa applicant from her only remaining family member (her aunt) in Australia. The Tribunal acknowledges the visa applicant's difficult circumstances as she is experiencing in Ethiopia and is cared for by her aunt (only) who is in Australia. The Tribunal acknowledges that these circumstances cause emotional hardship to both the applicants and in particular, to the review applicant who witnesses from a great distance the constant concerns of her niece in Ethiopia. Overall, the Tribunal considers that such a separation of a close family member, particularly having regard to the visa applicant's circumstances, constitute compassionate circumstances that affect the interest of Australian citizens or permanent residents, that justifies the grant of the visa.

31. Therefore, the requirements of PIC 4020(1) should be waived.

32. Have the applicants satisfied the identity requirements?

33. PIC 4020(2A) requires an applicant satisfy the Tribunal as his or her identity. There is no suggestion that the visa applicant's identity is at issue (based on the evidence the Tribunal was privy to at the hearing). Therefore, the applicant meets PIC 4020(2A).

as a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

34. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

35. There is no evidence that the visa applicant had previously been refused visas on the basis of a failure to satisfy PIC 4020. Therefore PIC 4020(2B) does not apply.

36.

37.

38. **CONCLUSIONS**

39. On the basis of the above, the applicant **does** satisfy PIC 4020 for the purposes of cl 117.223.

DECISION

40. The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa:
- Public Interest Criterion 4020 for the purposes of cl 117.223 of Schedule 2 to the Regulations

Peter Vlahos
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...